R. v. GERADA and FIVE OTHERS

SUPREME COURT (Kneller, C.J.): January 24th, 1994

Evidence—privilege—public interest immunity—exception to prosecution's duty to provide defence with unused material—public interest in withholding evidence to be weighed against accused's need for access to all relevant material—grant of immunity not necessarily final and may need to be reconsidered throughout trial

Evidence—privilege—public interest immunity—Minister's certificate not essential to application

The accused were charged with drugs offences.

The Gibraltar police planted listening devices on the premises of the accused to gather evidence of their suspected involvement in drug dealing. At the trial, the defence requested that their experts be allowed to examine the equipment used, which had been borrowed from New Scotland Yard's Criminal Intelligence Branch. At the request of the English authorities, who had obtained a certificate of public interest immunity from the Acting Governor, the Crown applied for an order exempting it from producing the equipment or explaining how it functioned.

It submitted that (a) public interest immunity formed an exception to the rule that the prosecution should make everything available to the defence; (b) it was necessary in the name of effective law enforcement to keep secret sensitive information about the surveillance equipment; and (c) it was not essential that the application be supported by a Minister's certificate.

The accused submitted in reply that (a) since the Crown was obliged to produce all material relevant to the proceedings which might assist them, their trial would be tainted by a material irregularity if they were unable to examine the equipment and test its operation; (b) the means by which the equipment was set up contravened s.7 of the Constitution, and since the conduct of the police so far in the proceedings had cast doubt on the reliability of the prosecution evidence, they could not now claim immunity; (c) the confidentiality attached to informants or occupiers of premises used for surveillance did not apply to information on surveillance equipment; and (d) the application should be dismissed, since it was not supported by a Minister's certificate, and neither the English officer invoking immunity nor the Acting Governor knew enough about the equipment.

Held, granting the application:

(1) The court had a discretion to grant public interest immunity in respect of evidence in criminal proceedings as an exception to the

Crown's duty to hand over to the accused any unused material that might assist them. Since the liberty of the accused was at stake, greater weight was to be attached in these proceedings than in civil proceedings to preventing prejudice by enabling them to challenge the case against them with the benefit of all relevant information. That had to be balanced against preventing the workings of surveillance equipment from becoming known to criminals who might then take counter-measures resulting in the equipment becoming ineffective (page 260, lines 34–40; page 262, lines 1–12).

(2) It was not essential that an application for public interest immunity be supported by a Minister's certificate. The issue of immunity could be raised by the court or by any party or witness and, consequently, such a certificate might not always be available (page 261, lines 5–24).

(3) Taking into account the Acting Governor's support of the application, the court accepted that the equipment was of such a sensitive nature that it should not be produced in evidence or its operation explained. The accused's defence could be conducted adequately without that evidence. However, this ruling was not necessarily final and the issue of immunity would be monitored by the court throughout the hearing (page 261 lines 41–45; page 262, lines 13–26).

Cases cited:

(1) *Air Canada* v. *Trade Secy. (No. 2)*, [1983] 2 A.C. 394; [1983] 1 All E.R. 910.
(2) *Connelly* v. *D.P.P.*, [1964] A.C. 1254; [1964] 2 All E.R. 401.
(3) *Conway* v. *Rimmer*, [1968] A.C. 910; [1968] 1 All E.R. 874.
(4) *D.* v. *N.S.P.C.C.*, [1978] A.C. 171; [1977] 1 All E.R. 589.
(5) *D.P.P.* v. *Humphrys*, [1977] A.C. 1; [1976] 2 All E.R. 497.
(6) *King* v. *R.*, [1969] 1 A.C. 304; [1968] 2 All E.R. 610.
(7) *Kuruma* v. *R.*, [1955] A.C. 197; [1955] 1 All E.R. 236.
(8) *Ong Ah Chuan* v. *Public Prosecutor*, [1981] A.C. 648; [1980] 3 W.L.R. 855.
(9) *R.* v. *Brixton Prison (Governor), ex p. Osman (No. 1)*, [1991] 1 W.L.R. 281; [1992] 1 All E.R. 108.
(10) *R.* v. *Davis*, [1993] 1 W.L.R. 613; [1993] 2 All E.R. 643, *dictum* of Lord Taylor, C.J. followed.
(11) *R.* v. *Hennessey* (1978), 68 Cr. App. R. 419.
(12) *R.* v. *Johnson*, [1988] 1 W.L.R. 1377; [1989] 1 All E.R. 121.
(13) *R.* v. *Rankine*, [1986] Q.B. 861; [1986] 2 All E.R. 566.
(14) *R.* v. *Sang*, [1979] 2 All E.R. 46; (1978), 68 Cr. App. R. 240; on appeal, [1980] A.C. 402; [1979] 2 All E.R. 1222.
(15) *R.* v. *Ward*, [1993] 1 W.L.R. 619; [1993] 2 All E.R. 577.
(16) *Rogers* v. *Home Secy.*, [1973] A.C. 388; [1972] 2 All E.R. 1057.

Legislation construed:

Supreme Court Ordinance (1984 Edition), s.12: The relevant terms of this section are set out at page 259, lines 32–35.

Gibraltar Constitution Order 1969 (Unnumbered S.I. 1969, p.3602), Annex 1, s.7: The relevant terms of this section are set out at page 259, line 38 – page 260, line 3.

J.E. Triay, Q.C. and *P. Dean, Senior Crown Counsel,* for the Crown;
C. Finch for the first and second accused;
J.J. Neish for the third, fourth and fifth accused;
G. Licudi for the sixth accused.

KNELLER, C.J.: Leading counsel for the prosecution has applied for an order of this court, first, exempting it from producing to the court and the defendants the equipment lent by the Technical Support Unit of the Criminal Intelligence Branch of the Metropolitan Police at New Scotland Yard to the Royal Gibraltar Police Force and, secondly, exempting its witnesses in this trial from answering revealing questions about the equipment and its methodology. The application is made under the provisions of the rules relating to public interest immunity.

Counsel for the six defendants have strongly opposed the application on many grounds and have called for a court order that obliges the prosecution to produce the equipment and reveal how it works or abandon the prosecution.

Detective Supt. William Scholes of New Scotland Yard's Criminal Intelligence Branch is in charge of its top-level surveillance activity. Its equipment and information on the way it works is not made available to the public because that would be a help to terrorists and big-time criminals. Some of the equipment and the way it works is devised by the Branch's technicians, who are very bright, but if their results were revealed the terrorists and international criminals could take countermeasures, and the Technical Support Unit would become ineffective. There is a limit to the technical expertise of its members. This would be so whether production and disclosure occurred in England or Gibraltar. First-league criminals from England have been seen to be associating with various people in Gibraltar.

The equipment was asked for by the Royal Gibraltar Police during the time of Det. Supt. Scholes's predecessor, who has since left the Metropolitan Police. A Deputy Assistant Commissioner came over to negotiate its use and four other officers came over several times. Mr. Scholes did not know which set was supplied but he knew in general terms what sort it was. He was not versed in how it operated, so if the application for public interest immunity failed he could not answer questions about its effectiveness. He did not know who manufactured it or if it was obtainable in High Street hi-fi stores. Any equipment known to be in the public domain would be yielded to the defence and this would include audio-visual devices.

It is normal in England for the use of such equipment to be authorized by an Assistant Commissioner of Police at the Yard, to gather evidence

when an alleged offence has occurred or is about to occur, and his permission to keep it running has to be sought every three or four weeks. There are two tapes: One is a master or control tape, and the other is a copy of it. They are sealed and preserved. Then, if there is to be a prosecution, they go to the Crown Prosecution Service, which tells the defence about them and hands over a copy. In England, the defence would not be told that there had been no surveillance and no tapes if there had been, and then six months later an admission made.

Nowadays, continued Det. Supt. Scholes, he asked the Crown Prosecution Service to instruct prosecuting counsel to ask the trial judge for public interest immunity without a certificate from a Minister or the Attorney-General. He admitted that since the equipment lent to the Royal Gibraltar Police between March and August 1990 had been used there had been great advances in such technology, but the set-up was still very "sensitive" and the experts wished to keep its characteristics secret. The fact that it had been installed by police officers breaking into premises at the slipway in the Marina owned by some of the defendants did not reduce its sophistication or "sensitivity." The results of directional microphones and their recording units he described as almost useless.

He knew of recent cases at the Central Criminal Court in London where similar equipment, its paraphernalia and their methodology had all been granted immunity from production and police witnesses exempted from answering searching questions on the grounds of public interest. Two were called "Operation Emerge" and "Mr. Joseph Piles."

Mr. Triay, Q.C., for the prosecution, indicated that if the issues were for him to decide he would see to it that the defendants' experts could inspect the electronic surveillance listening device and its monitors and check them and the resultant tapes. However, the tapes apart, they were not in Gibraltar but in England, and public interest immunity was claimed for them by Det. Supt. Scholes. Gibraltar had had a visit from people said to be terrorists and Grade 1 criminals. This was an international issue based on the security of the state or city.

There was no rule of law, he submitted, that the claim had to be supported by a Minister's certificate. The matter was one for the court to decide exercising its discretion, having balanced two public interests, namely, possible injury to the security of the nation or the frustration of justice. It was an exception to the rule that the prosecution should make everything available to the defence.

At first no reference was made in the statements of prosecution witnesses in the docket for the defence that the defendants' premises had been "bugged" and their conversations recorded, because it had been forbidden by a senior officer. This order had been reversed and the defence were promptly given copies of the relevant tapes. Breach of the provisions of the constitution did not lead to the automatic exclusion of evidence obtained as a consequence of it.

Mr. Finch, counsel for Mr. Gerada and Mr. Rodriguez, claimed that if the prosecution did not let the defence experts examine the equipment and its satellite devices the trial would suffer from a material irregularity, because the prosecution ought to produce all material relevant to these proceedings.

Here, members of the two police forces had entered the premises without a warrant, by force, stealth, artifice and no lawful colour, and planted these listening devices in the hope of one day picking up information which would be of use to the Royal Gibraltar Police Force. They were there for six months, which, according to Det. Supt. Scholes, would never have been countenanced in the United Kingdom. This was contrary to the provisions of s.7 of the Constitution of Gibraltar. The police could have obtained *ex parte* a warrant and executed it in respect of a particular offence they thought had occurred or would occur.

The prosecution had at first denied that the police had used any surveillance device or tapes when asked by the defence if they had, and then, months later, admitted that they had. This was an attempt to pervert the course of justice. When the prosecution admitted it had these tapes it asked for six months to transcribe them, but the Stipendiary Magistrate discharged the defendants, who were re-arrested by the police and bailed for six months.

Then there was an *ex parte* application by the prosecution for leave to apply for judicial review of the Magistrate's decision, which Alcantara, A.J. granted, but when Mr. Finch and Mr. Neish appeared at the *inter partes* hearing the learned judge revoked the leave because the prosecution had not put before him all the background relevant to the discharge of the defendants. And when some prosecution documents were about to be sent to England for examination by experts, Det. Sgt. Alcantara of the Royal Gibraltar Police Force revealed that a log-book's internal pages had been rewritten and the originals destroyed.

These and other matters, according to Mr. Finch, indicated that the police were not entitled to immunity because they had behaved improperly. The prosecution should not benefit from its wrongdoing. Moreover, the defence found it necessary to have the equipment and its workings tested by their experts, for which the Stipendiary Magistrate had given a legal aid certificate. Some of the issues are: (i) whether the tapes could be made on that equipment, (ii) whether the tapes are originals or copies, and (iii) whether the voices and noises on them are consistent with what the police allege.

There was no claim for public interest immunity before the Stipendiary Magistrate or until the Friday before this trial began. The certificate of the Acting Governor only supported the claim of Det. Supt. Scholes. The evidence for the need for public interest immunity was not convincing.

Additional points submitted by Mr. Neish on behalf of Mr. Ullger, Mr. Edward Victory and Mr. Obdulio Victory for rejecting the application for

immunity from producing the surveillance equipment and explaining how it works were these:

There are hard rules of evidence protecting against the identity of informers or the occupiers of premises used by the police as observation posts being revealed, but none in respect of surveillance equipment and how it is used.

The court should not tolerate the prosecution's application, being based on evidence from a New Scotland Yard officer who did not know how the device worked, or on a certificate from the Acting Governor who was probably just as ignorant.

Mr. Licudi, for Mr. Palao, argued that the defence had no duty to apply to the court for production of the machine because the prosecution was bound to yield it when the defence asked for it. Anything that might help the defence should be passed over by the prosecution. The Royal Gibraltar Police and the prosecution were in breach of this duty when they let the device return to England. He suggested that the defendants should have access to the materials, with their counsel and experts, in the presence of police officers, on condition that no evidence was given about their maker, characteristics and so forth. The defence would have to meet the prosecution case with both hands tied behind their backs if their experts could not base their findings on tests of the recording equipment.

So much for the claim, the evidence in support of it and the submissions of counsel. I now turn to the guidelines found in the authorities cited during the submissions. I set them out one after another so that they may be of help to the court when another application for public interest immunity is made. The alternative is to sprinkle them throughout the ruling which makes them difficult to collate. I will not be quoting from any decision of a Gibraltar court because none was cited and my hurried research has not discovered any.

Under s.12 of the Supreme Court Ordinance, the Supreme Court for Gibraltar (established by s.56 of the Constitution) shall—

> "in addition to any other jurisdiction conferred by this and any other Ordinance … possess and exercise all the jurisdiction, powers and authorities which are from time [to time] vested in and capable of being exercised by Her Majesty's High Court of Justice in England."

Section 7 of the Gibraltar Constitution, in so far as it is relevant, provides:

> "(1) Except with his own consent, no person shall be subjected to the search of his person or his property or the entry by others on his premises.
>
> (2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question makes provision—
>
> (a) in the interests of defence, public safety, public order…
>
> …

except so far as that provision or, as the case may be, the thing done under the authority thereof is shown not to be reasonably justifiable in a democratic society."

In *Ong Ah Chuan* v. *Public Prosecutor* (8) the Privy Council declared ([1981] A.C. at 670):

"In a Constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to 'law' in such contexts as … 'protection of the law' and the like … refer to a system of law which incorporates those fundamental rules of natural justice that has formed part and parcel of the common law of England that was in operation … at the commencement of the Constitution."

In *King* v. *R.* (6) Lord Hodson added ([1968] 2 All E.R. at 617) that—

"[a] constitutional right may or may not be enshrined in a written constitution, but … it matters not whether it depends on such enshrinement or simply on the common law… In either event, the discretion of the court must be exercised and has not been taken away by the declaration of the right in written form."

In *Kuruma* v. *R.* (7) ([1955] A.C. at 203) it was said by Lord Goddard, C.J. that "the test to be applied in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how the evidence was obtained." This is so even if it has been obtained illegally, unfairly, by a trick or by other misrepresentation, except where the actions of the prosecution amounted to an abuse of the process of the court and are oppressive: see *R.* v. *Sang* (14) ([1979] 2 All E.R. at 50).

Those who prepare and conduct prosecutions owe a duty to the courts to ensure that all relevant evidence that might help a defendant is led by them or made available to the defence: see *R.* v. *Hennessey* (11) (68 Cr. App. R. at 426); *R.* v. *Ward* (15); and *R.* v. *Davis* (10).

"…[A] trial judge has not and must not appear to have any responsibility for prosecution. …[He] has no power to refuse to allow a prosecution to proceed merely because he considers that … the prosecution ought not to have been brought.

…[He] may have power to stop a prosecution if it amounts to an abuse of the process of the court and is oppressive and vexatious"

See *R.* v. *Sang* ([1979] 2 All E.R. at 50) citing *Connelly* v. *D.P.P.* (2) and *D.P.P.* v. *Humphrys* (5).

"Crown privilege" is a misnomer. "Public interest immunity" refers to the rule that certain evidence is inadmissible because it would be contrary to the public interest to lead it. The public interest which demands that the evidence be withheld has to be weighed against the public interest in the administration of justice that courts should have access to all relevant material. If the former outweighs the latter the evidence cannot be

admitted. It is not something that can be waived by the Crown or anyone else. Any litigant or witness may ask for the evidence to be excluded because of its nature. The court will do so without being prompted if the production of that evidence is contrary to the public interest.

Some of the evidence which public interest demands should be withheld is within the knowledge of the Crown's servants. In England—up to 1972, at any rate—the objection to disclosure was taken by the Attorney-General or his representative on behalf of the political head of the Government department (the Minister) responsible for the matter that it was sought to exclude. The objection was expressed in or supported by the Minister's certificate. Thus, the claims were carefully considered at a high level and an authoritative opinion was followed.

Yet, even then, that procedure was not essential as a matter of law because in some cases the Minister or some other Minister or high official would not be available. Such a certificate would not be readily to hand if the court, a litigant or a witness raised the question of public interest immunity: see generally *Conway* v. *Rimmer* (3); and *Rogers* v. *Home Secy.* (16) ([1972] 2 All E.R. at 1065–1066). And by 1983 there had been some cases involving no certificate or its equivalent from a Minister or a highly-placed Crown servant because the Crown had not asked for the evidence to be excluded in the public interest. They were cases on the preservation of confidential information: see *Air Canada* v. *Trade Secy. (No. 2)* (1) ([1983] 2 A.C. at 409); and *D.* v. *N.S.P.C.C.* (4) ([1977] 1 All E.R. at 594).

So far as concerns the identities of informers and persons who allow their premises to be used for surveillance and the location of those premises, it is a long-established rule that on the grounds of public interest a trial judge is obliged to declare that a witness cannot be required to disclose such information, because the public would then be reluctant to help the police detect crime for fear of reprisal. There is one exception, namely, where the trial judge sees that its strict enforcement would be likely to cause an innocent man to be convicted: see *R.* v. *Rankine* (13) and *R.* v. *Johnson* (12) ([1988] 1 W.L.R. at 1385).

The general principles of public interest immunity apply to criminal proceedings. The balancing exercise will be different from that in civil proceedings. As was said in *R.* v. *Governor of Brixton Prison, ex p. Osman (No. 1)* (9) ([1991] 1 W.L.R. at 288): "…[W]here the interests of justice arise in a criminal case touching and concerning liberty or conceivably on occasion life, the weight to be attached to the interests of justice is plainly very great indeed."

A ruling in favour of non-disclosure in a *voir dire* is not necessarily final. The issue should be monitored by the court throughout the hearing. If the court changes its view, the prosecution will have to disclose or maybe offer no further evidence: see *R.* v. *Davis* (10) ([1993] 1 W.L.R. at 618).

I return now to the application. I recall that it is the duty of the prosecution to hand over to the defence any unused material that might be a help to it. Public interest immunity is an exception. Detective Supt. Scholes has applied for it and the Acting Governor by his certificate has supported it. They say, in essence, that if this surveillance kit is handed over to the defence experts or produced to the court and its workings made known, then terrorists and top-notch criminals will be able to take counter-measures with the result that the equipment and those who use it will be stymied. The defence maintain that the defendants will be greatly prejudiced if the prosecution's application for immunity is upheld. I do not forget this is a criminal trial and that the defendants' liberty is touched and concerned by all this.

Weighing these two public interests at this point in this *voir dire*, I accept Det. Supt. Scholes's assertion that the equipment is so sensitive that it should not be produced in evidence and its usefulness and characteristics should not be explained. I note that the Acting Governor certifies that he supports the claim.

I realize that the defendants' liberty is at stake, but at present I do not see that their defence cannot be conducted adequately without the device being tested by its experts and I certainly do not find at this stage that they must have it and know how it works to maintain their innocence. The issue of immunity may reappear in the trial and I will monitor it as we proceed.

As it is, therefore, I will exercise the discretion vested in the court to grant the prosecution's application for immunity from producing the equipment and its witnesses from revealing its methodology.

Order accordingly.
